

## **CHAPTER 6**

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## **CHAPTER 6**

### **PREPARING TO LITIGATE & DEFEND**

#### **I. INTRODUCTION.**

#### **II. CLAIMS PREVENTION.**

A. Prevention is the Best Defense.

B. Prevention During Contract Formation.

1. Review the procurement history of the same or similar items.

a. Find out whether previous contractors filed claims and why.

b. Fix past problems before awarding new contracts.

2. Use negotiated procedures whenever possible. Can look at things other than price. Can't gig a contractor just because they've filed lots of claims.

C. Prevention During Contract Administration.

1. Monitor the contractor's performance.

a. Government personnel should verify a contractor's work performance periodically and document significant observations.

b. Periodic monitoring permits the early identification of potential claims and the preservation of potential evidence.

2. Develop good documentation procedures. See FAR 4.803 and FAR 4.805.
  - a. Include the documents specified in FAR 4.803 in the contract file.
    - (1) Record every substantive conversation with the contractor.
    - (2) Make record copies of all correspondence.
    - (3) Record coordination on the back of record copies.
    - (4) Note the mailing date on letters.
  - b. Do not dispose of documents during the retention periods specified in FAR 4.805.
3. Answer the mail.
  - a. Avoid or minimize claims by investigating issues and responding to contractor complaints or requests for guidance/direction in a timely fashion. Especially important for the contracting officer.
  - b. Do not expect problems to disappear if ignored.
4. Bad facts make bad law.
  - a. Strive to develop a favorable factual record by treating contractors with courtesy and professionalism.
  - b. Avoid conduct that may appear petty (or not founded upon sound business judgment or practices) to an outside or impartial observer. See, e.g., Libertatia v. United States, 46 Fed. Cl. 702 (2000); Apex Int'l Mgt. Servs., ASBCA No. 38087, 94-2 BCA ¶ 26,842 (imposing breach damages against the government).
5. Ask contractors to record actual cost data to support requests for equitable adjustment.

### **III. PREPARING TO DEFEND.**

#### **A. Read the Contract.**

1. Obtain a copy of the contract, including:
  - a. Any modifications; and
  - b. Any plans, drawings, or specifications.
2. Review the entire document.
3. Ask knowledgeable persons to explain vague or technical portions.

#### **B. Review the Claim.**

1. Jurisdictional Issues.
  - a. Is the submission a claim?
    - (1) Is the submission a routine request for payment?
    - (2) Did the claimant submit its request in writing?
    - (3) Did the claimant request a sum certain, the adjustment or interpretation of a contract term, or other relief arising under or related to the contract?
    - (4) Did the claimant submit enough supporting data to allow the contracting officer to render an informed decision?
    - (5) Did the claimant certify its request if it exceeds \$100,000?

(6) Did the claimant implicitly or explicitly request a contracting officer's final decision?

b. Is the claimant a proper party? If the claimant is a sub, is the prime properly sponsoring the claim?

c. Is the claim timely?

2. Substantive Issues.

a. Identify the legal theories the contractor is relying on to show entitlement and the elements of proof for each.

b. Identify any legal theories supporting entitlement that the contractor has not yet raised and the elements of proof for each.

c. Identify possible defenses to each theory of entitlement and the elements of proof for each.

C. Review the Final Decision.

1. Did the contracting officer issue a written final decision?

2. Did the contracting officer issue the final decision in a timely manner?

3. Did the contracting officer properly advise the contractor of its appeal rights?

4. Did the contracting officer furnish the final decision to the contractor?

D. Identify and Interview Knowledgeable Persons.

1. Government Employees.

- a. Contract Personnel. Identify and interview the procuring contracting officer (PCO), the administrative contracting officer (ACO), the contract specialist, the contracting officer's representative (COR), and the contracting officer's technical representative (COTR).
  - b. Technical Personnel. Identify and interview the project engineer, the test engineer, the item manager, the quality assurance representative (QAR), the quality assurance specialist (QAS), and the industrial specialist (IS) (especially if these people work inside the contractor's facility).
  - c. Financial Personnel. Identify and interview the financial specialist, the cost analyst, and the auditor.
2. Contractor Employees. Identify and interview knowledgeable contractor employees.
  - a. Former contractor employees are often more candid than current employees. See, e.g., J.C. Equip. Corp., ASBCA No. 42879, 97-2 BCA ¶ 29,197 (finding the testimony of the appellant's president unpersuasive based, in part, on contradictory testimony provided by two of his former employees).
  - b. May have to go through contractor's attorney!
  - c. Ask government employees to assess the knowledge and honesty of contractor employees.
3. Protect your interviews as attorney work product.
  - a. Federal Rule of Civil Procedure (FRCP) 26(b)(3) protects documents prepared in anticipation of litigation or trial by a party or its attorney.

- b. Based on this rule, the government may be able to protect records of interviews prepared by field attorneys from later discovery. See generally B.D. Click Co., Inc., ASBCA Nos. 25609, 25972, 83-1 BCA ¶ 16,328; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 73-2 BCA ¶ 10,205.

E. Identify and Preserve Records.

- 1. Ask every knowledgeable person for relevant records. Look for personal diaries and logs.
- 2. Mark all records that may be relevant to the claim/dispute to prevent their routine destruction.
- 3. Protect the status of business records.
  - a. Federal Rule of Evidence (FRE) 803(6) permits the government to introduce records of regularly recorded activity as an exception to the hearsay rule if:
    - (1) The record was made at or near the time of the event;
    - (2) The record was made by persons with knowledge (or from information transmitted by a person with knowledge) of the recorded facts;
    - (3) The record was made in the regular course of business activity; and
    - (4) The regular practice of the business was to make the record.

See Rault Center Hotel, ASBCA No. 31232, 91-3 BCA ¶ 24,247 (admitting quality control questionnaires under FRE 803(6)); cf. USD Tech., Inc., ASBCA No. 31305, 87-2 BCA 19,680 (overruling the government's objection to the admission of a document in the Rule 4 file).



- b. Do not endanger the status of documents as business records by interfering with the way the government regularly maintains them.

#### **IV. THE RULE 4 (R4) FILE.**

A. What is a Rule 4 File? ASBCA Rule 4(a).

B. Why Prepare a Rule 4 File?

1. The Board will rely on the documents in the Rule 4 file to decide the appeal. But cf. Thomas & Sons Bldg. Contractor, Inc., ASBCA No. 43527, 96-1 BCA ¶ 28,101 (stating that “[a]dmission of a document . . . under ASBCA Rule 4 does not establish as true everything that is said therein”).
2. A well-prepared Rule 4 file:
  - a. Facilitates discovery;
  - b. Facilitates meaningful preliminary procedures;
  - c. Simplifies hearing procedures; and
  - d. May bolster the credibility of the contracting officer and other government witnesses.

See X-Tyal Int’l Corp., ASBCA Nos. 24353, 26495, 84-2 BCA ¶ 17,251 (stating that “[e]fficient use of the Rule 4 file cuts the costs of litigation to the parties and can significantly reduce the time needed to hear appeals”).

C. What Should the Rule 4 File Include? ASBCA Rule 4(a).

1. The Rule 4 file should include all documents pertinent to the appeal, including:

- a. The contracting officer's final decision;
- b. The contract, including pertinent plans, drawings specifications, and amendments;
- c. All relevant correspondence between the parties;
- d. Transcripts of testimony, affidavits, and witness statements made prior to the filing of the notice of appeal; and
- e. Other relevant information (e.g., audit reports, Department of Defense Inspector General (DODIG) reports, trip reports, production progress reports, inspection logs, quality deficiency reports (QDR), photographs, critical path charts, memoranda of phone conversations, evidence of the date the contractor received the final decision, etc.).

2. The Rule 4 file should not include:

- a. Privileged documents (e.g., attorney-client privileged documents, attorney work product, etc.);
- b. Rank hearsay prepared in anticipation of litigation; and
- c. Irrelevant documents.

D. Assembling a Good Rule 4 File. ASBCA Rule 4(c).

- 1. Requirements. See McDonnell Aircraft Co., ASBCA No. 37346, 96-1 BCA ¶ 28,164 (stating that Board orders "are not to be taken lightly or blatantly ignored" and discussing the Board's threat to preclude the government from introducing any oral or written evidence in further proceedings if the government continued to ignore the Board's order to retab the Rule 4 file).
  - a. Use originals, legible facsimiles, or authenticated copies.

- b. Place the contract first.
- c. Arrange the other documents in chronological order.
- d. Tab and number each document sequentially.
- e. Prepare a comprehensive index.

2. Practical Considerations.

- a. Copy head-to-head.
- b. Punch holes on the sides.
- c. Ensure that all documents are complete.
- d. Assemble the file into manageable volumes.

E. Submitting the Rule 4 File. ASBCA Rules 4(a) and 4(d).

- 1. The contracting officer is responsible for preparing the Rule 4 file; however, the field attorney should review it before the contracting officer submits it.
- 2. Each Chief Trial Attorney (CTA) has established procedures for distributing the Rule 4 file.
  - a. The contracting officer (or contract specialist) must normally make at least six copies of the Rule 4 file—one for the ASBCA, one for the head of the contracting activity (HCA), one for the appellant, one for the field attorney, and two for the trial attorney.
  - b. The contracting officer (or contract specialist) should use an overnight delivery service or first class mail to send the Rule 4 file.

3. Authorized Omissions.

- a. The contracting officer may omit the contract, including plans, drawings, specifications, and amendments, from the file it provides to the contractor. ASBCA Rule 4(a).
- b. Upon request, the Board may waive the requirement to furnish copies of bulky, lengthy, or out-of-size documents; however, the party requesting the waiver must make a copy of the document available for inspection.

F. Objecting to Documents in the Rule 4 File. ASBCA Rule 4(e).

1. A party may object to the Board's consideration of one or more documents in the Rule 4 file. See USD Tech., Inc., supra (noting that "[t]he Government is not deemed to have sponsored every document contained in its initial Rule 4(a) submission and is not precluded from objecting to the admissibility of particular writings therein").
  - a. If a party objects, the Board will remove the challenged document from the Rule 4 file.
  - b. The other party may then move to admit the document under ASBCA Rules 13 and 20.
2. A party will waive its right to object if it fails to assert its right in a timely manner.<sup>1</sup> See X-Tyal Int'l Corp., supra (overruling the appellant's objection to certain Rule 4 documents because the appellant did not raise its objections until after the hearing had started, even though the appellant had been in possession of the disputed documents for approximately two years).

G. Supplementing the Rule 4 File. ASBCA Rule 4(b).

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<sup>1</sup> A party must object to documents in the Rule 4 file "reasonably in advance of:" (1) the hearing; or (2) the settling of the record if there is no hearing. ASBCA Rule 4(e).

1. The appellant may supplement the Rule 4 file within 30 days of the date it receives its copy. See Trinity Universal Insurance Co., ASBCA No. 41846, 96-1 BCA ¶ 27,976 (refusing to allow the appellant to supplement the Rule 4 file because it failed to adhere to the Board's Scheduling Order); see also International Crane Co., ASBCA No. 49604, 00-1 BCA ¶ 30,624.
2. The Board normally permits the parties to submit supplemental Rule 4 matters even after the 30-day submission period expires; however, the Board may refuse to accept additional documents at some point in time. See Hill Constr. Corp., ASBCA No. 43615, 92-2 BCA ¶ 24,832 (ordering the parties to supplement the Rule 4 file with documents that address issues raised by the appellant's notice of appeal and complaint regarding the imposition of liquidated damages).

## **V. THE TRIAL ATTORNEY'S LITIGATION FILE (TALF).**

- A. The contracting officer sends a TALF to the CTA at the same time the contracting officer sends the Rule 4 file to the Board.
- B. The TALF should include:
  1. A list of potential witnesses;
  2. A signed statement from each government witness;
  3. The contracting officer's analysis of the dispute;
  4. A legal memorandum discussing the relevant legal issues;
  5. Privileged documents not included in the Rule 4 file (e.g., communications with an attorney, attorney work product, trade secrets of other contractors, classified documents, etc.); and
  6. Other potentially relevant documents not included in the Rule 4 file.

## **VI. CONCLUSION.**